IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1899.

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GEORGE DEWEY, *Appellant*,
*v.*
THE UNITED STATES.

No. 546.
Appeal from the Court of Claims.

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## STATEMENT OF CASE, ASSIGNMENT OF ERROR AND ARGUMENT FOR APPELLANT.

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### *Statement of Case.*

This is an appeal by the claimant from the judgment of the Court of Claims in an action for bounty for destruction of the enemy's vessels at the battle of Manila Bay on May 1, 1898. The court rendered a judgment in favor of the claimant for one-half of the amount claimed.

The statute under which this action is brought is § 4635 of the Revised Statutes, as follows:

"A bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at the commencement of an engagement, which is sunk or otherwise destroyed in such engagement, by any ship or vessel belonging to the United States or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars, if the enemy's vessel was of inferior force and of two hundred dollars, if of equal or superior force, to be divided among the officers and crew in the same manner as prize money."

The Court of Claims found (Rec. p. 12) that the engagement resulting in the destruction of the enemy's

vessels was between vessels of war of the United States and vessels of war belonging to the King of Spain, supported by shore batteries, submarine mines and torpedoes; that the enemy's force, without considering the supporting shore batteries and submarine defenses, was inferior to the force of the United States; but, considering the shore batteries and submarine defenses, was superior. The court decided that the comparison of forces contemplated by the statute did not admit of considering the shore batteries and submarine defenses as any part of the force of the enemy's vessels destroyed, and consequently, having fixed the number of men on the vessels destroyed at 1914, held that bounty should be allowed only at the inferior rate of $100 a man, a total of $191,400, and rendered judgment for the claimant, as commanding officer of the fleet, for five per cent of the entire bounty, the share fixed by § 4631, Revised Statutes. It is from this judgment that the present appeal is taken.

### *Assignment of Error.*

For error the claimant avers that the court erred in law in holding that the supporting shore batteries and submarine defenses should not be considered as part of the force of the Spanish vessels destroyed for the purpose of determining the bounty *per capita* due under this statute.

## ARGUMENT.

### *The Positions of the Parties.*

The Court of Claims, in its elaborate opinion upon this subject, declared that a literal construction of the statute required, in comparing the forces, that the batteries, torpedoes and mines be excluded. The opinion says:

"The question arising upon the statute is as to what is meant by the term, 'if the enemy's vessel was of inferior,

* * * if of equal or superior force.' Is the force contemplated by the statute such force only as is necessarily incident to the men employed upon the vessel, and to the force of the vessel arising from its construction, its armament, equipment, and development as an instrumentality of war? It will be seen that the force specified by the terms of the law is the force of 'the enemy's vessel,' thereby in terms precluding from the consideration of force the environment of power which may surround the vessel, but forming no necessary part or portion of it. The statute under consideration is to receive by the court such a construction as its terms necessarily import and require. It is not a question of what might be called unwritten law, but a question of purely statutory construction, and the intent of the legislature must be deduced from the terms employed in the phraseology and words of the statute. Courts have no power other than the interpretation of the law as in their judgment it exists. Questions of policy addressing themselves to other branches of the Government are not incident to the judiciary. They have no policy and no authority save and except the declaration and application of the law as in their judgment it may seem to exist. Congress have passed the statute and defined its purposes in the express averment of words. Courts are constrained to follow the import of those words in the determination of the rights of parties and of the Government. In doubtful cases arising from ambiguous language courts will inquire into surrounding circumstances, having in view the history of the times and the condition intended to be affected by the law in coming to a conclusion as to its proper construction. But unambiguous words, importing in and of themselves the purpose and will of the legislature, must be permitted to perform their legitimate functions in the development and ascertainment of that will. Congress intended, by the act of 1864, to reward, as has been said, personal bravery and gallant encounter, but it does not follow from that that they intended beyond what they have expressed in the words of the law.

"No cases have arisen upon the statute involved in this proceeding except the cases referred to, and none can arise hereafter, as Congress on March 3, 1899 (30 Stat. L.

1007), repealed all the provisions of law 'authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war.'

"From this view of the law, the court determines that the claimant is entitled to recover on the basis of fact, that excluding the batteries, torpedoes and mines, the force of the vessels of the Spanish fleet was inferior to the force of the American vessels, and that therefore the claim comes within that clause of the law which allows the sum of $100 for each person on board the vessels sunk and destroyed, and a judgment is hereby ordered on that theory for the sum of nine thousand five hundred and seventy dollars."

The positions of the claimant are,—

(1) That the statute being designed to grant a double reward for a victory over a superior or equal force, it should be applied with a view to carrying out that general purpose and this demands the consideration of the entire force of the enemy in the engagement.

(2) That the words of the statute "if the enemy's vessel was of inferior force" literally mean not alone the force on the particular vessel destroyed, but the entire force supporting it.

### *The Purpose of the Statute.*

The statute declares on its face its general object, to give a greater reward where a greater force is overcome. This is clearly stated by Judge Lowell in *The Selma*, 1 Low. 30; 21 Fed. Cases, 1045:

"This course of decision is ably vindicated by my eminent predecessor, in the case of *The Cherokee* (Case No. 2640), in 1864. His opinion is founded upon the usual and obvious meaning of the language of the statutes, as well as upon their general purpose. And it may be added to the reasons given in that judgment, that the intent of

our law clearly is to encourage personal gallantry, enterprise, and perseverance, whether applied to the capture of armed or unarmed vessels. Thus the whole net proceeds of a prize are given to the captors, when she is of equal or superior force to the vessel or vessels making the capture, but only one-half where she is of inferior force. Again, the head-money which our law grants is larger, when the hostile force is equal or superior, but no head-money at all is given excepting for hostile vessels of war sunk or destroyed, and when due is to be distributed like prize money; showing that the grant is intended as a substitute for the prize itself."

It is plain that, if the general object of this law is to be carried out, the question to be answered in any case is simply—What was the relative strength of the two forces engaged? If the enemy's force was equal or superior, it required greater daring to overcome it than if inferior. The superior gallantry which the law designs to reward is no different, if the superior force attacked is all afloat or partly afloat and partly ashore. Unless the reward is to be granted on some other rule than its relation to the measure of gallantry displayed, the comparison must be between the entire forces. Whether the force of the United States engages an enemy's combined force ashore and afloat, or afloat alone, the comparison must be with the whole force engaged.

### *The Result of the Present Decision.*

Any different rule would lead to such a result as the following: Representing the force of the United States as 100, if an enemy's exactly equal force, all afloat, also represented as 100, was overcome, double bounty would be paid. On the other hand, if a mixed force, afloat and ashore, were engaged of which the force afloat was as 99 and the supporting force ashore as 101, only single bounty would be paid, although in the latter case, the force defeated would have been twice that in the former. Where sup-

posed literalism leads to such an absurdity, courts may well look to the underlying principle of the legislation as the basis for some other rule.

### *The Principle Illustrated.*

This case itself, in the circumstances preceding the engagement, furnishes a striking illustration of this principle. Admiral Montojo, in his report of this battle (Appendix to the Report of the Bureau of Navigation, 1898, p. 89) describes his trip to Subic with his squadron for the purpose of receiving there the expected attack of the American vessels. He thus reports the conditions:

"With much disgust, I found that the guns which should have been mounted on that island were delayed a month and a half. This surprised me, as the shore batteries that the navy had installed (with very little difficulty) at the entrance of the bay of Manila, under the intelligent direction of colonel of naval artillery, Señor Garces, and Lieutenant Beneavente, were ready to fight twenty-four days after the commencement of the work.

"I was also no less disgusted that they confided in the efficacy of the few torpedoes which they had found feasible to put there.

"The entrance was not defended by torpedoes nor by the batteries of the island, so that the squadron would have had to bear the attack of the Americans with its own resources, in 40 meters of water and with little security."

The consequence of these conditions is thus stated by him:

"The same day, the 28th of April, I convened a council of the captains, and all, with the exception of Del Rio, chief of the new arsenal, thought that the situation was insupportable and that we should go to the bay of Manila in order to accept there the battle under less unfavorable conditions."

Thus the purpose of Admiral Montojo's return to Manila Bay was to secure to his vessels the support of the shore batteries, mines and torpedoes there, and he stationed his fleet with a view to making the best possible use of these weapons. The shore batteries, mines and torpedoes at Manila Bay were weapons designed especially to engage ships coming from the sea and to aid a fleet in attacking or resisting the attack of such ships. Such weapons so circumstanced and actually used in attacking and resisting the attack of the American fleet could only be excluded as part of the force of the vessels destroyed upon the idea that in the contemplation of the statute every force of a vessel must be exercised on or from that vessel. We see nothing in the letter of the law to support so strained and limited a construction, totally at variance with its spirit.

Coming to Manila and securing to his vessels the force of the shore batteries, torpedoes and mines there, Admiral Montojo presented to Commodore Dewey a greatly superior force. A greater victory was won under these conditions than had the battle been at Subic Bay, with American vessels matched against Spanish vessels unsupported. It is a direct reversal of the principle of this statute to deny, under these circumstances, double the reward that would be given had Commodore Dewey engaged the inferior naval force alone.

### *The Shore Defenses the Distinctive Feature of This Engagement.*

The circumstances which give the chief permanent glory as a military achievement to the victory of Manila Bay is that the American fleet, unaided by an army, attacked a force composed of ships supported by powerful shore defenses and not only destroyed or captured all the vessels, but captured or silenced the shore batteries. The importance of the engagement to the naval historian is

that the capture of shore defenses was attained by a fleet under such conditions for only the second time in naval history.

This appears from the statement of Admiral P. H. Colomb, R. N., in his recent authoritative work, "Naval Warfare:"

"The fall of Chagres (March 24, 1740) after an attack by bombardment alone, comes upon us now, we may observe, as in some sort a novelty in naval war. We have had captures of forts by the attack of land forces, without any direct assistance from the ships; we have had them when the attack by ships had been made subsidiary to that by land forces; and we have seen the captures made as at Gibraltar and Porto Bello, where the main attack has been by the ships and the land attack has completed it. We have also had bombardments where no surrender has followed. This fall of Chagres appears to be the first instance of capture following simple bombardment, but the course of history shows us that the result was exceptional, and depended on the geographical situation of the place and the moral fibre of the garrison defending it."

No other such capture intervened in the following century and a half preceding the battle of ManilaBay. Farragut passed shore batteries, destroyed the enemy's fleet and captured the shipping in the harbor at New Orleans, some 68 miles by river above the principle shore batteries he engaged; but after the shipping had been captured and General Butler's army had even landed and taken possession of New Orleans, the Confederate flag still floated above Forts St. Philip and Jackson.

Sir George S. Clarke, the eminent English authority, in his standard work, "Fortification," speaks as follows (p. 250):

"From the above it will be evident that comparatively few ships exist which are capable of engaging coast batteries armed with the 6-inch guns. Some battle

ships and some 'coast defense' vessels are suited for the purpose; but the cruiser class, as a whole, and all vessels of European Powers likely to be found across the Atlantic, in the Pacific, in Indian or Cape waters, are disqualified from fighting defenses properly conceived and organized.

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"Modern field guns, well posted behind extemporized cover, would suffice to drive off any one of the ships referred to with much damage and heavy loss."

Do. page 257:

"The unarmored vessels, of which the cruiser fleets of the world are almost entirely composed, even if provided with protected decks, can not stand against any guns which can reach them, and mere water-line belts are more likely to secure the capture of an enemy's ship by keeping her afloat, than to save her from being quickly put out of action by loss of men and by structural injuries, dangerous in proportion to the nearest repairing base."

The same author, concluding a detailed consideration of parapets, guns, mines and torpedoes, says:

"The appliances at the disposal of coast defenses are thus many and powerful. Recent Artillery progress, and in a special sense the perfection of the position finding system have told heavily against the chances of the ship. Meanwhile, the ship herself has grown less capable of attacking coast-defenses, unless specially constructed for the purpose, and even then her protected armament is numerically weak. By far the greater portion of the navies of the world is practically disqualified from a combat with well-mounted guns on shore. Attacks on the defended ports of civilized powers have never figured largely in naval warfare. The experience of the American war showed clearly that the co-operation of a land force was practically essential to success; and purely naval operations against coast works are unlikely to be undertaken in the future, unless there are special reasons to doubt the efficiency of the organization and resources of the defense."

Major R. F. Johnson, R. A., in an article on "The Attack of a Coast Fortress," Proc. R. A. Inst., vol. 20, p. 368, enforces the same view:

"Probably there are few naval officers who do not feel obliged to acknowledge the soundness of Admiral Selwyn's advice: 'I hope that naval officers will consider that a fort is a thing to be avoided.'"

Other British authorities are quoted by him to the same effect (p. 369):

"Captain Jackson, R. N., writes: 'Ordinary sea-going ships of war are not, and never have been, intended by their designers to engage forts. They are built to fight other ships.'

"Rear-Admiral S. Long, R. N., said at the R. U. S. Institution 'If ships are pitted against guns on shore, unarmored ships do not appear so favorably situated as in the days of wooden ships.'

"And Vice-Admiral Sir E. Fremantle, in the subsequent discussion, agreed 'that the armament of our cruisers is such that the strength of a cruiser is only sufficient to fight its own equal, that she is not of much value against a fort.'"

Captain C. Benoit of the French Army, in an article entitled "Navires de Guerre et Batteries de Côte (Revue d'Artillerie, vol. 54, April, 1899, p. 5), quotes the opinion of Admiral Fournier:

"It will be imprudent to expose our ships against coast defenses in unproductive battles, much more enfeebling and demoralizing, in general, for the assailants by sea than for the defense on land."

The same author quotes also from "Des Operations Maritimes Contre les Côtes," etc.:

"The ravage of the coasts by the guns of the fleets is often spoken of; it is in general a fantasy which has no further merit than to attract attention."

Lieutenant-Commander (now Captain) Charles F. Goodrich, U. S. N., in an official report on the bombardment of Alexandria in 1882 (Report of British Naval and Military Operations in Egypt, 1882, Office of Naval Intelligence, War Series, No. III), says (p. 74):

"Having the essential facts of the last engagement between ships and earthworks at hand, it is impossible not to draw one broad inference, that vessels are not yet and never will be able to fight on even terms with forts."

Do. page 75:

"The forts at Alexandria were badly bruised, but the more modern parapets were not seriously harmed. In the generality of cases the real damage they sustained could have been easily repaired in a single night. If the bombardment was directed against the forts in this their defensive capacity it must be pronounced a failure.

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"The British, while surprised by the tenacity of their opponents, were the first to confess that men of a stamp at all similar to their own would have accepted the gage thrown down the next day, and have renewed the fight."

All this concurrent testimony of high authorities leads to the conclusion that the most important feature of the engagement at Manila Bay, the chief mark of its preeminence in naval history, is to be omitted entirely from consideration in deciding the pecuniary reward bestowed on the victors by the United States, if the judgment of the Court of Claims is to stand. So unreasonable a result is not to be reached unless the statute clearly forbids a better conclusion.

### *The Value of Mines and Torpedoes.*

The Court of Claims equally excludes the torpedoes and submarine mines from consideration. These, too, were important factors in the result, and, with an overcautious commander, might have prevented the bold en-

trance which foretold the coming victory. Major R. F. Johnson, R. A., in the paper already cited, says (p. 367):

"Submarine mines are generally credited with exerting a great moral effect, even when the local conditions are most unfavorable to their use, but this will be worth nothing at all if a Farragut commands the attack."

Surely we may couple with the name of Farragut that of the later commander who learned his lesson under Farragut and applied it with like boldness at Manila Bay. And we may add that it can not have been in the contemplation of Congress to withhold any portion of the larger reward granted for overcoming a superior force because its superiority consisted in part of these rightly-feared submarine mines and torpedoes.

***Earlier Precedents.***

It is not surprising, in view of the purpose of the law, to find that this opinion of the Court of Claims is the first approval by any judicial tribunal of the principle that in the comparison of the forces of vessels under the bounty and prize laws the shore batteries and submarine mines aiding and protecting them are not to be considered. Nor can it be found that at any time the executive authority of the Government having jurisdiction over the proceedings in prize and bounty cases ever authoritatively assumed this position.

The Court of Claims, in its opinion (Rec. pp. 17, 18) states, with great care, the circumstances under which an award was made and paid to Admiral Farragut and his officers and men for prize money and bounty arising out of the capture of New Orleans (*United States* v. *Farragut*, 22 Wal. 406). The history of this case is so thoroughly stated by the Court of Claims, and its bearing so important, that the statement of that court is here inserted (see Rec. pp. 17, 18):

"The case of the United States against Farragut,

decided by the Supreme Court of the United States and reported in 22 Wallace, 406, was an appeal from the court of the District of Columbia in a case growing out of the capture of New Orleans by Admiral Farragut in the year 1862.

"It is said in substance, in the statement of the case in the Supreme Court of the United States, that the result of the reduction of the forts was the capture of large number of vessels, coal, and other property. All this property was appraised at the time by a board of officers duly appointed for that purpose. But there being no district court in the eastern district of Louisiana open at that time, and much of the property steamers unfit to be sent to sea, and much of it being necessarily used by the Army and Navy of the United States in their further operations in the Gulf and Mississippi River, none of it was sent to be condemned, but appraised at the time of the capture.

"Congress accordingly on the 3d of March, 1869 (15 Stat., 336), passed an act in substance that the said vessels shall now be entitled to the benefit of prize law in the same manner as they would have been had the district court for the eastern district of Louisiana been opened and the property taken by said vessels, had been libeled therein; and any court of the United States having admiralty jurisdiction may take and have cognizance of all cases arising out of said capture. In pursuance of that statute a libel was filed in the Supreme Court of the District of Columbia on the 26th of April, 1869.

"While said proceeding was pending in the Supreme Court of the District, the subject-matter of the proceeding was referred to the determination of arbitrators chosen by the respective parties, and it was agreed that their award should be final upon all questions of law and fact involved in the cases, and that such award might be entered as a rule and decree of the court.

"The arbitrators chosen as aforesaid made an award as follows, to wit:

"'First. That the capture was not a conjoint operation of the Army and Navy.

"'Second. That the 42 vessels whose names were given produced in the captnre of the United States.

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"'Fifth. That all this property was lawful prize of war and lawfully subject to condemnation as such.

"'Sixth. That in the engagement which resulted in the capture of those ships the entire force of the enemy was superior to the United States ships and vessels engaged.'

"The United States made a motion to set aside the award controverting all the facts found by the arbitrators; but the court refused to set aside the award, and on the contrary, entered a decree of the court confirming the award. From that decree the United States took an appeal. After the case came into the Supreme Court of the United States, the Attorney-General dismissed the appeal as to the coal and certain vessels, amounting in the aggregate sum of $613,520. In the Supreme Court some of the exceptions to the report of the arbitrators were considered; and it is said 'where the award finds facts it is conclusive; where it finds and announces concrete propositions of law, unmixed with facts, its mistake, if one is made, could have been corrected in the court below, and can be corrected here. Where the proposition is one of mixed law and fact in which the error of law, if there be one, can not be distinctly shown, the parties must abide by the award.' The court says, 'A glance at these grounds will show that all of them except the last is an attempt to reopen the question submitted to the arbitrators, because they had decided erroneously questions of pure fact or of law and fact in which the former was so mingled with the latter as to be inseparable.'

"The court further says, 'Having found the captor, the property captured, the name and character of the vessel engaged in it, and the nature of the capture, the only question open was the character of the captured property.' The court concluded that 'It does not appear, therefore, that in holding these vessels liable to capture in condemnation as lawful prizes of war the arbitrators violated any principle of prize law; but it is quite clear that in awarding the value of these vessels to the captors as prize, and in addition 40 per cent. that value for salvage, they did violate law and justice.' The last of the opinion has reference to certain vessels which belonged to certain loyal owners which were delivered to them, and upon which the decree allowed military salvage. That por-

tion of the decree was held to be erroneous by the Supreme Court, and was therefore reversed.

"The finding of the arbitrators and the court below that the force of the enemy was superior to the force of the United States ships and vessels was accepted as true by the Supreme Court, and, therefore, no question was made as to whether the superiority of force was to be determined by the force on board the ships of the enemy or might include, as a force of the enemy's ships, the forts and batteries on land.

"From the well-known facts of history, it must be assumed that the force which was overcome by Admiral Farragut in the capture of the prizes was superior because of the forts and batteries on shore; and that in making the award and entry of the decree the force of such forts and batteries were included in calculating the force of the enemy employed in the engagement."

The Court of Claims concludes, and it must be conceded to be correct in this, that this court did not there reach the question at issue in this case, namely, whether the shore batteries could be included in determining the relative force. Notwithstanding that, this decision in the *Farragut* case presents itself with a very considerable degree of authority in favor of such inclusion. The award, in which was enunciated in its sixth finding the rule for which we now contend, was originally made by a distinguished board of arbitrators (22 Wall. 413) selected with a care worthy of so great a case. It comes with their authority.

The Supreme Court of the District of Columbia, although asked, did not set the award aside, but entered it as its own decree. Thus the award has the authority of that court.

That court might have ordered the arbitrators to state their findings of fact in such manner as to separate the questions of fact and of law, which this court decided were comprised together in the sixth finding of the

award. If the question of law had been deemed worthy of dispute, that court would have so ordered. It was not done because the representatives of the United States, the District Attorney and the special counsel representing the Secretary of the Navy, did not consider the right to include the shore defenses a subject of serious contest. The fourth exception of the Government (22 Wall. 415) does not in terms indicate any attempt to raise this question. Had it been considered an issue, the United States would have insisted on the award being framed in such a way that the points of law and fact might have been separated. The implied acquiescence of the Government's counsel in the doctrine announced by the arbitrators and contended for in this case was indicated by their acceptance of the arbitrators' award in this form and their failure to raise the question in their exceptions.

But the acquiescence of the Executive Department of the Government was shown in a still more conclusive manner by the Attorney-General afterward coming into the Supreme Court of the United States and voluntarily dismissing his appeal as to a portion of the award in which the decision of the arbitrators upon this question was a directly controlling factor, to the extent of one-half of the sum of $613,520, reserving certain other questions in regard to particular vessels. The acquiescence of the executive branch of the Government in this conclusion at this time, so soon after the close of the Civil War, is proof that it was the accepted doctrine in prize and bounty adjudications arising out of the Civil War that all forces should be taken into consideration in determining the relative force of the United States and of the enemy, and that the Secretary of the Navy and the Attorney-General regarded the question as *stare decisis*. The liability of the United States in this respect was thus conceded by its own officers.

The Supreme Court of the District of Columbia, in the case of *Porter* v. *United States*, which afterwards reached this court (106 U. S. 607) arrived again at the same conclusion on this question. Of this the Court of Claims says (Rec. p. 19):

"In that case a decree had been entered in the district court of the District of Columbia upon the legal theory that, in estimating the force of the enemy, the force of 'batteries and other adjuncts' might be included in the force of the enemy in determining the rights of the capturing or destroying vessels."

Here was another decision of the same court exactly opposed to the decision now announced by the Court of Claims, and in this case likewise it nowhere appears that the United States disputed this doctrine. On appeal to this court the Government made no contention on this point, but asserted successfully a defense going to the merits.

This review of the cases cited in the opinion of the court below shows that it was not only the practice of the prize courts to treat shore defenses as a portion of the enemy's force in determining questions of prize money and bounty; but that the executive departments had acquiesced in this rule of decision.

Surely no change should be made in the rule thus long established so as to give to the naval victors of the Spanish war a different measure of reward under the same statute from that received in the Civil War when the statute was much more recently enacted. It should not be done unless the terms of the act show absolutely that Congress intended this unreasonable result and that the decisions of the Supreme Court of the District of Columbia during and after the Civil War and the acquiescence of the executive were entirely unwarranted by law.

### *The True Literal Construction.*

The Court of Claims treats the expression used in § 4635 "if the enemy's vessel was of inferior force" as necessarily limiting the comparison to the force on or exercised from the vessel, excluding every other force, offensive or defensive, and however efficient, that aided the vessel to make or resist attack. In doing this, the court admits that it disregards all questions of the intent of the law and rests itself entirely upon a purely literal construction. Danger can not be reckoned, nor the courage required to meet that danger be estimated along such narrow lines. Yet under the statute the force of the enemy's vessel is the measure of reward for the courage displayed in meeting danger. That courage is not divisible; nor can the force encountered by that courage be divided, and a gun be lopped off here and a torpedo there, which actually took part in the engagement and aided in defending the vessel from destruction, merely because such gun was not fired or such torpedo discharged from the vessel. No such construction is demanded by the words. *Of* imports possession, not location, and the force of a vessel is every force that vessel possesses to aid and protect it in the fight. It is its entire fighting potentiality. A vessel of inferior force is a vessel whose potentiality under the conditions of the battle is less. Submarine mines and supporting shore batteries aiding and protecting it all compose part of the force of a vessel in a naval engagement, and all must be counted in deciding whether the condition has arisen for which the statute gives a double reward, namely, success against superiority of force. Such conditions are all within the literal terms of the statute, "if the enemy's vessel was of inferior force," as they are absolutely required to be considered if regard is to be paid to its purpose.

It can not be said that the statute, because it describes

an engagement between vessel and vessel, did not mean to contemplate any force except that exercised on or from the vessels. There was such a naval combat as the statute contemplates when our armed vessels destroyed armed vessels of the enemy. It would be as reasonable to deny bounty altogether, when part of the fighting potentiality of the vessels destroyed consisted of submarine mines and supporting shore batteries, on the ground of it not having been a naval engagement, as to hold that these fighting forces should not be counted, though actually participating and having to be reckoned with in every manœuver throughout the engagement, from the moment when it was determined to pass the outer defenses of these vessels, the heavy guns at Corregidor, El Fraile, and the entrance to Boca Grande Channel, to the end of the engagement.

It should be continually borne in mind that these submarine mines and shore batteries were peculiarly forces of naval warfare intended to encounter ships and to aid the Spanish vessels in such an encounter. Admiral Montojo states that the shore batteries at the entrance of the Bay of Manila were actually installed by the Navy.

***Consequences of an Overstrained Literalism.***

This is, indeed, a statute where overstrained literalism will lead to many wholly impossible consequences. The bounty is given for each person on "any ship or vessel of war" of the enemy which is sunk "by any ship or vessel" of the United States. Can it be said as to any one of the enemy's vessels at Manila that it was sunk "by any ship or vessel" of the United States? Each was sunk by the combined assault of the fleet, and no one vessel can claim any other as its victim. The words of the statute, if strictly construed, apply only to an engagement of a single vessel on each side. They do not describe a fleet engagement, such as occurred here, where vessels

of war of the enemy were destroyed by vessels of the United States collectively. They literally only describe such a contest as that between the *Constitution* and the *Guerriere*, or between the *Kearsarge* and the *Alabama*, where there was only one ship on each side. But there never can be a serious contention that this statute should be so literally read as to reach such a decision. The consequence is too absurd; the legislature can not have intended such a result.

We may go a step farther. If there is to be an absolutely strict adherence to the words of the statute, without considering its purpose, the comparison between the enemy's force and the force of the United States must be of all the American vessels participating in the action with only those of the enemy's vessels actually destroyed. Thus, if a single vessel of the United States, itself superior to each of two vessels of the enemy but inferior to them jointly, engaging in battle with them, should sink one and capture the other, such literal adherence as the Court of Claims demands, would give bounty for the destruction of one vessel at the rate of $100 per man, since the vessel actually destroyed was by itself of inferior force to the vessel destroying it. On the other hand, if both vessels were destroyed, then the double bounty would be paid on both. Such an interpretation as this is demanded by the rule of absolute adherence to literal construction announced by the Court of Claims. No one could contend for it, because, unless absolutely required by the terms of the statute, Congress will not be presumed to have intended any such irregular and abnormal distribution of the nation's bounty.

Suppose a naval vessel of the enemy had so surrounded herself with submarine defenses that, taking these into account, her force was clearly superior to that of an attacking vessel of the United States, yet by a torpedo boat attack skilfully managed, an approach was made

and the vessel destroyed, should it be said that, if the vessel alone were of inferior force to the attacking vessel, the single bounty should be paid? The mines would form a part of the vessel's defensive force. Can a construction be correct which would deny double bounty in a case like this involving the greatest gallantry against what the statute makes the decisive test of the right—an enemy of superior force?

### *Analogy of the Prize Law.*

Our laws relating to prize and bounty first appear in the statute of April 23, 1800, §5, 2 Stat. L. 53, vol. 2, ch. 33.

"That the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall when of equal or superior force to the vessel or vessels making the capture, be the sole property of the captors; and when of inferior force, shall be divided equally between the United States and the officers and men making the capture."

Section 7 reads:

"That a bounty shall be paid by the United States of $20 for each person on board any ship of an enemy at the commencement of an engagement, which shall be sunk or destroyed by any ship or vessel belonging to the United States of equal or inferior force, the same being divided among the officers and crew and in the same manner as prize money."

The first of these sections can not be grammatically construed, as it would be absurd to refer the words "of equal or superior force" to the "proceeds" arising from the sale of the prize. We must therefore refer these words, "of equal or superior force," to "the ships and vessels and the goods taken on board of them." Now, the goods taken on board of prize vessels can not possibly be estimated when we are considering the force that is to be

compared with the force making the capture. Yet they must be taken into account, if this statute is to be construed literally. For example, suppose the capture of a barge loaded with coffee, and without a man or a gun upon it; where would be the "force" of that prize? But suppose this barge guarded by a man-of war, superior in fighting force to the capturing vessel. We then have no difficulty at all if we consider that the word "of" in the sentence "all ships or vessels of superior or equal force" is used in the sense of "possessed of." In that case, the captured barge was "possessed of" a defender, the force of which may be reckoned, and of course that force implies fighting force. The insertion of this word furnishes a solution of the whole difficulty. The word "of" has many meanings. The second signification given in Webster is:

"denoting possession or ownership, or the relation of subject to attribute; as, the apartment *of* the Consul, etc."

In the Century Dictionary, before giving specific definitions, we have the statement that this word has been transformed

"through several intermediate gradations of meaning into that of possessing or being possessed by, pertaining to, or being connected with, in almost any relation of thought."

Now, we submit that the case of a prize being possessed of or accompanied by, or having a relation to protecting war-ships, was really the leading idea in the minds of the legislators who framed this bill. At that time it was even more common than it is to-day, to send merchant vessels under a convoy of naval ships; and if we consider the word "of" in this statute as indicating what it means naturally, and what the Congress must have meant, "possessed of," then it follows that Congress never meant that the force of the prize should necessarily be located

upon or operated from that prize. To declare that such was its meaning would be to decide that Congress did the futile thing of excluding from the benefits of its law the most numerous class of the cases it was seeking to provide for.

In 1800, and for many years thereafter, it was the policy of our Government even to equip privateers to prey upon the commerce of an enemy; to cripple him financially was one means of bringing him to terms. During the Revolutionary War our naval vessels had preyed upon the commerce of the enemy and the captures of goods by us had mostly been made from merchantmen, sometimes protected and sometimes unprotected by convoying ships. It surely can not be contended that this law was not meant to embrace captures of that kind. If so, the statute is to be read as if the word "possessed" were inserted before the words "of equal or superior force." If this be admitted we have made one step forward in the solution of the question now before the court, as we have reached the conclusion that the "force" of a prize is not confined to the force operating from and upon the prize itself.

Now, reasoning from this conclusion as a premise, how else can we define the force of a prize than by saying it comprises all the fighting force protecting and defending the prize at the time of the capture, all the force co-operating in the defense of the prize, whether that force consists of torpedoes, submarine mines, or shore batteries, or all of these together? This conclusion we reach simply from the meaning of the word, if we consider that the word "of," as applied to the prize, means "possessed of," a meaning which, according to lexicographers, it frequently has.

This conclusion is fortified by the consideration that this construction carries out the purpose and intent of the law. That Congress intended to reward the sailor in

some proportion at least to the valor he exhibited is too clear for argument. If such was the intent of the law, then the narrow construction put upon this statute by the court below, in excluding from consideration submarine mines and torpedoes and shore batteries, shuts out the heroes of Manila from the rewards that Congress intended they should enjoy. The construction we contend for carries out the purpose of the law.

The conclusion we have reached is still further strengthened by the re-enactment in 1862 of the law, as it was first enacted in 1800, and substantially again in 1864. Then Congress increased the bounty to be given for the destruction of naval vessels. That bounty had been $20, under the law of 1800, where the destroying ship was of equal or inferior force to the enemy. Now it was changed to $100 where the enemy's vessel was of inferior, and $200 where the enemy's vessel was of equal or superior force.

Why so greatly increase at that particular period a bounty which had remained the same for over sixty years? History tells us. We were then at war and the Confederates had invented the submarine torpedo. It was a dangerous weapon, and the very thought of it was demoralizing. It had already destroyed a number of United States vessels. It is not possible to conceive that Congress should have made this large increase in the reward to be given, without once thinking of the deadly torpedo which was at the time in the mind of every sailor and every reader of the newspapers of the day. We must, therefore, conclude, unless we impute to Congress the folly of legislating without reference to existing conditions, and the extravagance of increasing rewards five and ten times over without any sufficient reason, that in adding to the bounty given and using again the words "of equal or superior force," it considered that increased reward should accompany increased dangers that tor-

pedoes and the several other forces co-operating with and defending a vessel, were included by these words.

Our contention, too, justifies the wisdom of Congress in using at the outset generic terms, and in not undertaking to define the word "force" or to prescribe its extent or limitation. Just as the words "regulation of commerce" in the Constitution included every instrumentality of commerce, such as the telegraph, that might come into existence in the future, so the word "force" included every fighting force that might come into existence afterwards in aid of vessels, such as torpedoes and submarine mines. Shore batteries, it is true, were in existence and had often been used, at the time the act was passed in 1800, to defend merchant-ships and war-ships; but if the construction we contend for is correct, then the words of the original law included and were intended to include these batteries. We contend it was the intention of the act of 1800 that if a merchantman, entirely unarmed and lying under the guns of shore batteries, was captured in spite of these batteries, these guns were to be taken into consideration, because they were the force of which the prize was possessed; just exactly as much the force of that prize as a man-of-war lying alongside of the prize would be. To say that the Congress intended to exclude from its prize law a ship captured under these circumstances, or if it did not exclude it as prize, to say that the heroism of the sailors who encountered these shore batteries, was not to be rewarded, is to declare that the act of Congress was much narrower in its effects than was the intention of the legislators, and that to that extent their effort to reward valor was futile.

We submit that there are no words in the statute which compel the court to come to any such conclusion. If there is any expression in the statute that would allow the inclusion of a ship co-operating with a prize and exclude co-operating shore batteries we have been unable to find it.

It follows, of course, that the bounty law is to be construed like the prize law. Both laws are found in the same enactment and use the same words.

### *Absurd Consequences Avoided.*

Reading the statute in this way, all the absurdities resulting from an over-literal construction are avoided. In the case heretofore supposed of an American vessel of superior force to either of two vessels of the enemy, but of inferior force to the two combined, destroying one and capturing the other, it would be entitled to the double bounty for the destruction of one vessel and to double prize money for the capture of the second, just as if both were destroyed or both captured. Thus reading the section, the destruction of a fleet by a fleet would be equally rewarded as of a vessel by a vessel. Equally necessary to the proper result of the statute's purpose is the construction contended for in this case, that the entire opposing forces are to be compared and that the statute considers the force of the vessel to be the force protecting and defending it, whether directly upon it or not.

### *Elements of Protective Force.*

In the case of *The Atlanta*, 3 Wall, 425, this court laid down the principle on which force should be estimated. It was contended that the *Atlanta*, a powerful Confederate ram, had been captured by the *Weehawken*, a vessel in and of itself clearly inferior in force to the prize. The *Nahant*, another United States vessel, was present at the capture and preparing to attack the *Atlanta* when that vessel surrendered. The *Nahant* had not fired a shot, but the court held that it was bound to consider the surrounding circumstances, such as the force, position, conduct, and intention of the *Nahant*, the language of the court being:

"The point presented is whether, under these circumstances, the *Nahant* is to be regarded as one of the cap-

turing vessels within the meaning of the act of Congress. The importance of the point is this: The *Weehawken* was confessedly inferior in force to the *Atlanta*, and if she is alone to be regarded in the comparison of forces, the whole prize money goes to the captors. On the other hand, the combined force of the two monitors was superior to that of the *Atlanta*, and if both are to be regarded as capturing vessels, only one-half of the prize money goes to the captors, and the decree must be affirmed.

"The mere fact that the only shot fired, and the only damage done, was by the *Weehawken*, is not decisive. Other circumstances must be taken into account in determining the matter—such as the force, position, conduct and intention of the *Nahant*. The two vessels were known to be under the same command and of nearly equal force. The *Atlanta* descended the sound to attack both, and governed herself with reference to their combined action. It is not reasonable to suppose that her course would have been the one pursued, had she had only the *Weehawken* to encounter. Besides, the fire of the *Atlanta* was directed entirely to the *Nahant*, and of course diverted her from her consort. It is possible that a different result might have followed had the fire been turned upon the *Weehawken*. This diversion must be considered in every just sense of the term as giving aid to her. Again, the power of the shot of the *Weehawken* had evidently surprised the officers of the *Atlanta*, who found their vessel speedily disabled and their crew demoralized. The advance upon her, at full speed, of a second monitor, of equal force, ready to inflict similar injuries, may have hastened the surrender. It can hardly be supposed that the approach of the second monitor did not enter into the consideration of the captain and officers of the *Atlanta*. If the shot from the guns of one of the monitors could, in a few moments, penetrate the casemate of the *Atlanta*, crush in the bars of her pilot-house, and prostrate between forty and fifty of her men, her captain might well conclude that the combined fire of both would speedily sink his vessel and destroy his entire crew. It can not be affirmed, nor is it reasonable to suppose, that any of the incidents of the battle would have occurred as they did, if the *Nahant* had not been present in the action."

This decision has not only the force conceded for it by the Court of Claims, but it involves the principle that the force to be estimated is the entire potential force surrounding the engagement.

### *Rules of Liberal Construction.*

Ample warrant for liberal construction of this kind is found in the principles laid down by this court in a very celebrated case, that of the *Church of the Holy Trinity* v. *United States* (143 U. S. 457). This court, in considering the contract labor law and the penalties claimed under it on account of a literal construction of its terms, said (p. 458):

"It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words labor and service both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind'; and, further, as noticed by the Circuit judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section."

Yet even after this complete concession that a literal construction of the terms of this statute would include the act complained of in that case the court followed these very words immediately by the following conclusion (p. 459):

"While there is great force to this reasoning, we can not think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illus-

trating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

The court cited many authorities and concluded the elaborate opinion as follows (p. 472):

"Suppose in the Congress that passed this act some Member had offered a bill which in terms declared that if any Roman Catholic church in this country should contract with Cardinal Manning to come to this country and enter into its services as pastor and priest; or any Episcopal church should enter into a like contract with Canon Farrar; or any Baptist church should make a similar arrangement with Rev. Mr. Spurgeon; or any Jewish synagogue with some eminent Rabbi, such contract should be judged unlawful and void, and the church making it be subject to prosecution and punishment, can it be believed that it would have received a minute of approving thought or a single vote? Yet it is contended that such was in effect the meaning of this statute. The construction invoked can not be accepted as correct. It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore can not be within the statute."

See also *Canal Co.* v. *R. R. Co.* 4 Gill & J. 152; *Brown* v. *Somerville*, 8 Md. 444, 456; *Jackson* v. *Collins*, 3 Cow. 89, 96; *Murray* v. *Baker*, 3 Wh. 541.

We do not hesitate to apply to the present case this doctrine and to ask this question. Had the proposition been presented to the Congress that passed this act: "In case of an engagement between vessels of the United States and vessels of the enemy, supported by land batteries and submarine mines, making altogether a force superior to that of the United States, shall the bounty be granted at the rate fixed for an inferior opposing force or at the rate fixed for a superior opposing force?" Would the proposition to give the inferior rate where the superior force was conquered "have received a minute of approving thought or a single vote? Yet it is contended that such was in effect the meaning of this statute. The construction invoked can not be accepted as correct."

The very recent case of *The Buena Ventura* (175 U. S. 384), is also in point. Here was a proclamation whose terms, except by exercising the liberal construction demanded by its purpose, did not literally include this vessel; yet it was held to be included and the court decided that the language was sufficient, because such must have been the intent of the executive. The opinion says:

"To attribute an intention on the part of the Executive to exempt a vessel if she sailed on or after the 21st of April, and before the 21st of May, and to refuse such exemption to a vessel in precisely the same situation, only sailing before the 21st, would, as we think, be without reasonable justification. It may safely be affirmed that he never had any such distinction in mind and never intended it to exist. There is nothing in the nature of the two cases calling for a difference in their treatment. They both alike called for precisely the same rule, and if there be language in the clause of proclamation from which an inference can be drawn favorable to the exemption, and none which precludes it, we are bound to hold that the exemption is given. We think the language of the proclamation does permit the inference and that there is none which precludes it."

The general principle of this case applies directly to the pending appeal. Suppose that after the victory of Manila Bay, another American fleet of equal force to Admiral Dewey's had conquered an exclusively naval force, its own superior, but of marked inferiority to the force which Admiral Dewey conquered. Would any court have given double the bounty for the lesser achievement? Where both overcame superior forces the court would have said: "There is nothing in the nature of the two cases calling for a difference in their treatment. They both alike called for precisely the same rule." And the language of the statute now under consideration gives ample authority for the inference that no distinction was intended.

The rewards given by a grateful country for a victory like that at Manila can not be rightly ruled by the same strictness of construction as a statute imposing a penalty. The purpose of Congress should be looked at broadly. It is a generous grant of the nation's bounty as a reward for gallant service and its interpretation must be in the line of its generous spirit.

In the case of *Silver* v. *Ladd*, 7 Wall. 219, this court held that under the donation act of September 27, 1850, a widow could take, although the words seemed to confine the benefit of the act to single men, married men and their wives, as

> "the act was passed for the purpose of rewarding in a liberal manner a meritorious class of persons who had taken possession of that country (Oregon) and held it for the United States, under circumstances of great danger and discouragement."

### *No Future Claims.*

The law distributing prize money and bounty to the navy has been repealed by the act of March 3, 1899 (30 Stat. L. 997), and the cases arising out of the Spanish war are

the last to be adjudicated. We have already seen that, with the assent of the executive authorities and by decisions of the courts, the rule actually applied in the past has been to consider the land forces as a portion of the force constituting the measure of comparison. Admiral Farragut's reward was granted on this basis for the capture of New Orleans and Lieutenant Dewey participated in that reward under that rule of distribution. If a new rule, which never before received judicial approval until the decision of the Court of Claims in this case, is now substituted for the old, it will not apply to any future line of cases but simply to the battles of the Spanish War, chiefly to the action at Manila Bay. The statute itself is unchanged. It is not right that when this law has long been in force and subject to uniform interpretation, there should now, in its application to events occurring in the last year of its existence, be applied a new rule of construction, less favorable to the naval officers and men, its beneficiaries.

### *Equal Justice.*

It is not possible to reconcile with a sense of justice, that under precisely the same law and in the same state of facts, Admiral Farragut and his men, in a litigated case, with the approval of the Navy Department, should have been given twice the measure of reward which this claimant and his men are to receive for the battle of Manila Bay. The equal justice of the law has long been its proudest dignity.

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